

1992

Randy R. Krantz v. Utah Department of Commerce, Division of Real Estate and Utah Real Estate Commission : Petitioner's Reply to Respondent's Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920487CA

IN THE UTAH COURT OF APPEALS

RANDY R. KRANTZ,

Petitioner,

v.

Case # 920487-CA

UTAH DEPARTMENT OF COMMERCE,

DIVISION OF REAL ESTATE AND

UTAH REAL ESTATE COMMISSION,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

Petition for Review of Order on Review of
Utah Department of Commerce and Order of
Utah Real Estate Commission and
Utah Division of Real Estate

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DEC 21

Priority 15

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FACTS

Krantz agrees with Respondent's Statement of Facts. (Respondent's Brief, 6-16.) However, Krantz disputes Respondent's characterization of certain conclusions by the Administrative Law Judge as "factual". These disagreements are discussed below as they relate to "Standard of Review".

REPLY

1. Standard of Review.

The Utah Supreme Court case Morton Intern., Inc v. Auditing Div., 814 P.2d 581 (Utah 1991) is controlling.

Krantz does not seek review under Utah Code Section 63-46b-16 (g) which would call for the application of the "substantial evidence" test by the Court to determinations of fact by the Administrative Law Judge ("ALJ"). Instead, Krantz seeks review under Section 63-46b-16 (4) (a), (c), (d) and (h) (iii) of the Code. Under these sections, the standard is either "correction of error" or "bounds of reasonableness". Id. at 585, 586.

What discretion does Section 61-2 of the Code grant the Agency in interpreting or applying the law; and where, absent this discretion, does the Agency have expertise in interpreting or applying the law beyond that which the Court possesses ?

Section 61-2-5.5 (1) (a) limits the Commission's rule making authority to matters "for the administration of this chapter which are inconsistent with this chapter"

Section 61-2-11 grants discretion in imposing sanctions

for violations of the chapter. However, it grants no discretion to either the Director or the Commission in interpreting the law or applying it to the facts of a particular case.

An analysis of the subsections of Section 61-2-11 shows a mixture of matters involving common law concepts [(1), (2) and (16), for example], purely administrative matters [(5), (9) and (10), for example], and matters particularly within the expertise of the Agency [(8) and (18), for example].

The limitation on the rule making authority of the Commission in Section 61-2-5.5 (1) (a) (v), "not inconsistent with this chapter", serves at least two purposes. First, it says that the Agency, through the Commission, may interpret the statute by issuing administrative rules. Second, it says that the language of the statute limits the exercise of this discretion.

It is noteworthy that the statute does not grant the Agency discretion in acting without the benefit of interpretative rules. The inference is then that the plain language of the statute must be interpreted and applied under applicable principles of common law unless the matter is administrative or particularly within the Agency's expertise.

The Utah courts have deferred to State agencies in matters involving "being unworthy or incompetent" or "unprofessional". See, for example, Heinecke v. Dep't of Commerce, 810 P.2d 459 (Utah App. 1991). However, they have not deferred to agencies in determining whether or not there has been "misrepresentation", "any false promise", or a breach of "fiduciary duty".

If the Legislature had intended for the Agency to exercise discretion in applying or interpreting the statute, absent explicit rules, it could simply have stated that being unworthy, incompetent or unprofessional as sufficient basis for invoking the sanctions of the licensing law. It then could have offered as illustrations of such conduct the other matters included in Section 61-2-11. This, however, it did not do.

Therefore it remains for the Court to determine whether or not it should defer to the Agency's application or interpretation of common law principles under the licensing law. For the reasons set forth in Morton, Krantz contends that the Court should not defer to the Agency's application and interpretation of the law and that the "bounds of reasonableness" should apply.

2. False Promise.

Krantz contends that the Agency erroneously interpreted or applied the law in concluding that Krantz made a false promise to the Stones in violation of Section 61-2-11 (2) of the Code.

The Agency was not simply interpreting or applying Section 61-2-11 (2) in reaching its conclusion. **It was interpreting and applying the common law as well.** Under Morton, the Court is to grant no deference to the Agency's interpretation or application of common law principles. Id. at 585.

Without contesting any findings of fact and simply considering the Agency's application of the common law to these findings in reaching its conclusion, Krantz contends that the Agency's conclusion was not within the bounds of reasonableness.

The Agency's conclusions regarding Krantz's duty, the recklessness of his conduct, and the relationship between recklessness and falsehood exceed the limits of applicable common law principles and fall outside the domain of the agency's discretion and expertise.

The Agency tries very hard to substantiate its conclusion that Krantz made a false promise to the Stones. Following its analysis where cases are cited, it seems reasonable to conclude that Krantz made no false promise. (R/267) It is only when the Agency moves away from the cases that it comes to the conclusion that Krantz's promise was false. In doing so, it confuses two of the elements cited in Dugan. Dugan v. Jones, 615 P.2d 1239 (Utah 1980). Dugan and its progeny state that a promise must be false and that it be made knowingly or recklessly.

The ALJ relies on a conclusion that Krantz acted recklessly (disputed in Petitioner's Brief, 20-27) to support a conclusion that Krantz's promise was false. (R/267-9) However, these are two independent elements. Furthermore, the ALJ had already cited cases holding that a promise is false only if "made without a present intent to perform as promised". (R/267) Yet earlier the ALJ found that Krantz intended, contrary to the Stones' understanding, to purchase the home on a simple assumption. (R/264)

The Agency's analysis and conclusions in applying or interpreting the law thus go beyond the bounds of reasonableness.

3. Misrepresentation.

Section 61-2-11 of the Code holds a licensee accountable for substantial misrepresentation in subsection (1), for being unworthy or incompetent in subsection (8), for breaching a fiduciary duty in subsection (16), for dishonest dealing in subsection (17), and for unprofessional conduct in subsection (18).

Reading the ALJ's conclusions of law in the Gaster matter (R/274-5), the Respondent's Brief (38-42), and the cases cited in each, it seems that duties arising under one subsection, for example (16), are used to broaden duties existing under the common law applicable to another subsection, for example (2). (See Respondent's Brief, 40.) Krantz's brief (27-31) contents that each violation of a statutory duty must be based on the specific subsection invoked and the law applicable to the concept expressed in that subsection. Thus, the law of misrepresentation should not be broadened simply because a licensee has a duty under another subsection to avoid dishonest dealing; and likewise, matters involving potential conflicts of fiduciary duty, assuming such duties exist, should not be dealt with under the umbrella of misrepresentation.

To do so exceeds the bounds of reasonableness. It also calls into question whether or not issues, particularly relating to fiduciary duty, remain to be decided under Section 63-46b-16 (4) (c) of the Code.

4. Unworthy or Incompetent.

The reasons set forth in 3 with regard to misrepresentation

apply to the Agency's conclusions regarding Krantz's duties to safeguard the interest of the public under subsection (8).

5. Fiduciary Duty.

The reasons set forth in 3 with regard to misrepresentation apply to the Agency's conclusions regarding Krantz's duties as a fiduciary to the Gastors.

6. Agency's Prior Practice.

The Earnest Money Sales Agreement used by Krantz in the Stone transaction was approved by the Real Estate Commission and the Attorney General's Office. (R/308-9) It did not distinguish between various types of assumptions and failed to deal with questions relating to release of liability.

The Agency requires licensees to use this form as printed. Krantz did so, yet was found to act recklessly for making a promise in the unaltered language of the form. The Agency provides no fair and reasonable basis for prohibiting Krantz or other licensees, without notice, from relying on the terms of the form.

7. Due Process.

The Agency's "Utah Real Estate News" case summaries amount to, at most, headnotes. A reading of the report in the Krantz matter would not give licensees more than a partial indication of the issues addressed in the Agency's decision. (See Exhibit "B", Respondent's Brief)

Krantz is not suggesting that the Agency provide rules for every conceivable issue, but rather argues that: (1) fundamental

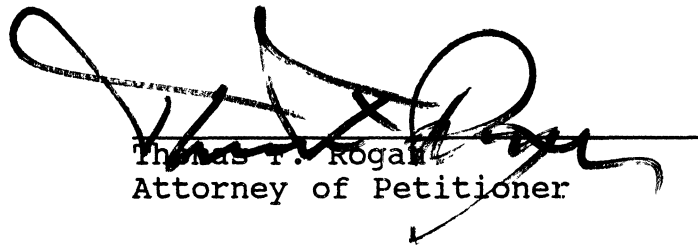
issues such as those raised in this case should be anticipated by interpretative rules; and (2) in the absence of such rules,

the Agency should abide stricly with common law principles in applying Section 61-2-11.

CONCLUSION

Petitioner asks that the relief sought under its brief be granted.

RESPECTFULLY SUBMITTED on this 21st day of December, 1992,



Thomas R. Rogan
Attorney of Petitioner

ADDENDA

- "A": Utah Code Section 61-2-5.5
- "B": Utah Code Section 61-2-11
- "C": Utah Code Section 63-46b-16 (4)

Addendum "A"

lated to secure the rental or leasing of real estate;

(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or

(iii) ordering or otherwise arranging for repairs to the real estate;

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (a) and (c); and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.

(10) "Real estate" includes leaseholds and business opportunities involving real property.

(11) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection (9). 1991

61-2-3. Exempt persons and transactions.

This chapter does not apply to:

(1) (a) any person who as owner or lessor performs the acts set out in Subsection 61-2-2(9) with reference to property owned or leased by that person or any regular salaried employee of that person;

(b) the exemption in Subsection (a) does not apply to:

(i) employees engaged in the sale of property intended for residential use;

(ii) employees engaged in the sale of properties regulated under Title 57, Chapter 11, Utah Uniform Land Sales Practices Act;

(iii) employees engaged in the sale of cooperative interests regulated under Title 57, Chapter 23, Real Estate Cooperative Marketing Act; or

(iv) any person whose interest as an owner or lessor was obtained by him or transferred to him for the purpose of evading the application of this chapter and not for any other legitimate business reason;

(2) isolated transactions by persons holding a duly executed power of attorney from the owner;

(3) services rendered by an attorney at law in performing his duties as an attorney at law;

(4) a receiver, trustee in bankruptcy, administrator, executor, or any person acting under order of any court;

(5) a trustee or its employees under a deed of trust or a will;

(6) any public utility, its officers, or regular employees, unless performance of any of the acts set out in Subsection 61-2-2(9) is in connection with the sale, purchase, lease, or other disposition of real estate or investment in real estate unrelated to the principal business activity of that public utility; or

the real estate is a necessary element of a "security" as that term is defined by the Securities Act of 1933 and the Securities Exchange Act of 1934 and if the security is registered for sale pursuant to the Securities Act of 1933 or by Title 61, Chapter 1, Utah Uniform Securities Act; and

(b) the exemption in Subsection (a) does not apply to exempt or resale transactions. 1991

61-2-4. One act for compensation qualifies person as broker or sales agent.

One act, for valuable consideration, of buying, selling, leasing, or exchanging real estate for another, or of offering for another to buy, sell, lease, or exchange real estate, requires the person performing, offering, or attempting to perform the act to be licensed as a principal real estate broker, an associate real estate broker, or a real estate sales agent as set forth in this chapter. 1985

61-2-5. Division of Real Estate created — Functions — Director appointed — Functions.

(1) There is created within the Department of Commerce a Division of Real Estate. It is responsible for the administration and enforcement of this chapter, the Real Estate Education, Research, and Recovery Fund, the Utah Uniform Land Sales Practices Act, and the Timeshare and Camp Resort Act.

(2) The division is under the direction and control of a director appointed by the executive director of the department with the approval of the governor. The director holds his office at the pleasure of the governor.

(3) The director, with the approval of the executive director, may employ personnel necessary to discharge the duties of the division at salaries to be fixed by the director according to standards established by the Department of Administrative Services.

(4) On or before the first day of October of each year the director shall, in conjunction with the department, report to the governor and the Legislature concerning the division's work for the preceding fiscal year ending June 30.

(5) The director, in conjunction with the executive director, shall prepare and submit to the governor and the Legislature a budget for the fiscal year next following the convening of the Legislature 1989

61-2-5.1. Procedures — Adjudicative proceedings.

The Division of Real Estate shall comply with the procedures and requirements of Title 63, Chapter 46b, in its adjudicative proceedings. 1987

61-2-5.5. Real Estate Commission created — Functions — Appointment, qualifications, terms, and compensation of members — Meetings.

(1) There is created within the division a Real Estate Commission. The commission shall:

(a) make rules for the administration of this chapter which are not inconsistent with this chapter, including:

(i) licensing of principal brokers, associate brokers, sales agents real estate

- (iii) proper handling of funds received by real estate licensees, and brokerage office procedures and recordkeeping requirements;
- (iv) property management; and
- (v) standards of conduct for real estate licensees;

(b) establish, with the concurrence of the division, all fees as provided in this chapter and Title 61, Chapter 2a, Real Estate Recovery Fund Act;

(c) conduct all administrative hearings not delegated by it to an administrative law judge relating to the licensing or conduct of any licensee or the certification or conduct of any real estate school, course provider, or instructor regulated under this chapter;

(d) take administrative action against licensees and certificate holders in conjunction with the director, including the imposition of a fine, or probation, suspension, revocation, or denial of reissuance of any real estate license or school, course provider, or instructor certification;

(e) advise the director on the administration and enforcement of any matters affecting the division and the real estate industry;

(f) advise the director on matters affecting the division budget;

(g) advise and assist the director in conducting real estate seminars; and

(h) perform other duties as provided by this chapter and Title 61, Chapter 2a, Real Estate Recovery Fund Act.

(2) The commission shall be comprised of five members appointed by the governor and approved by the Senate. Four of the commission members shall have at least five years' experience in the real estate business and shall hold an active principal broker, associate broker, or sales agent license. One commission member shall be a member of the general public. No more than one commission member may be appointed from any given county in the state. All terms of appointment to the commission shall be for five years. No commission member may serve more than one consecutive term. Terms shall be staggered to provide that the appointment of one member of the commission ends June 30 of each year. Members of the commission shall annually select one member to serve as chairman.

(3) Members of the commission shall receive necessary expenses incurred in the performance of their duties and a per diem allowance as provided by law.

(4) The commission shall meet at least monthly. The director may call additional meetings at his discretion or upon the request of the chairman or upon the written request of three or more commission members. Three members constitute a quorum for the transaction of business.

1991

61-2-6. Licensing procedures and requirements.

(1) The Real Estate Commission shall determine the qualifications and requirements of applicants for a principal broker, associate broker, or sales agent license. The division, with the concurrence of the commission, shall require and pass upon proof necessary to determine the honesty, integrity, truthfulness, reputation, and competency of each applicant. The division, with the concurrence of the commission, shall require an applicant for a sales agent license to

The hours required by this section mean 50 minutes of instruction in each 60 minutes; and the maximum number of program hours available to an individual is ten hours per day. The division, with the concurrence of the commission, shall require the applicant to pass an examination approved by the commission covering the fundamentals of the English language, arithmetic, bookkeeping, real estate principles and practices, the provisions of this chapter, the rules established by the Real Estate Commission, and any other aspect of Utah real estate license law considered appropriate. Three years' full-time experience as a real estate sales agent or its equivalent is required before any applicant may apply for, and secure a principal broker or associate broker license in this state. The commission shall establish by rule the criteria by which it will accept experience or special education in similar fields of business in lieu of the three years' experience.

(2) The division, with the concurrence of the commission, may require an applicant to furnish a sworn statement setting forth evidence satisfactory to the division of the applicant's reputation and competency as set forth by rule.

(3) A nonresident principal broker may be licensed in this state by conforming to all the provisions of this chapter except that of residency. A nonresident associate broker or sales agent may become licensed in this state by conforming to all the provisions of this chapter except that of residency and by being employed or engaged as an independent contractor by or on behalf of a nonresident or resident principal broker who is licensed in this state.

1988

61-2-7. Form of license — Display of license.

The division shall issue to each licensee a wall license showing the name and address of the licensee. The seal of the state shall be affixed to each license. Each license shall contain any other matter prescribed by the division and shall be delivered or mailed to the address furnished by the licensee. The wall licenses of principal brokers, associate brokers, and sales agents who are affiliated with an office shall be kept in the office to be made available on request.

1991

61-2-7.1. Change of address — Failure to notify.

Each licensee or certificate holder shall notify the division in writing of any change of principal business location or home street address within ten business days of the change. In providing an address to the division a physical location or street address must be provided. Failure to notify the division of a change of business location is separate grounds for disciplinary action against the licensee or certificate holder. A licensee or certificate holder will be considered to have received any notification which has been mailed to the last address furnished to the division by the licensee.

1991

61-2-7.2. Reporting requirements.

The following must be reported in writing to the division within ten business days:

- (1) conviction of any criminal offense; or
- (2) filing a personal or brokerage bankruptcy.

1991

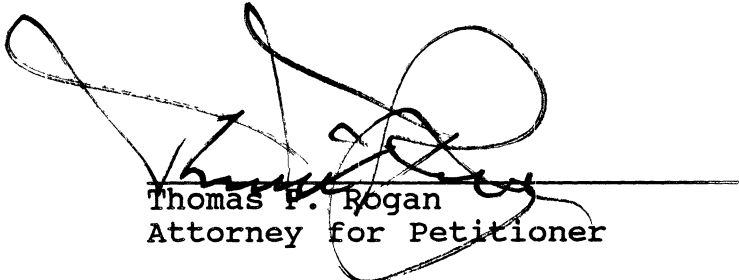
61-2-8. Discharge of associate broker or sales agent by principal broker — Notice.

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PROOF OF SERVICE

I, Thomas F. Rogan, certify that on December 21, 1992, I personally provided TWO COPIES of the attchaed Petitioner's Reply to Respondent's Brief to R. Paul Van Dam, Utah Attorney General (c/o Robert Steed, Assistant Attorney General), counsel for respondent in this matter, by hand-delivering them to him at the following address:

Robert Steed
Assistant Atorney General
36 South State Street, Suite 1100
Salt Lake City, UT 84111



Thomas F. Rogan
Attorney for Petitioner

Addendum "B"

For the purpose of this addendum

mance of any of the acts specified in this chapter from any person except the principal broker with whom he is affiliated and licensed. An inactive licensee is not authorized to conduct real estate transactions until he becomes affiliated with a licensed principal broker. No sales agent or associate broker may affiliate with more than one principal broker at the same time. Except as provided by rule, a principal broker may not be responsible for more than one real estate brokerage at the same time. 1987

61-2-11. Investigations — Subpoena power of division — Revocation or suspension of license — Grounds.

The division may investigate or cause to be investigated the actions of any principal broker, associate broker, sales agent, real estate school, course provider, or school instructor licensed or certified by this state, or of any applicant for licensure or certification, or of any person who acts in any of those capacities within this state. The division is empowered to subpoena witnesses, take evidence, and require by subpoena duces tecum the production of books, papers, contracts, records, other documents, or information considered relevant to the investigation. Each failure to respond to a subpoena is considered as a separate violation of this chapter. The commission, with the concurrence of the director, may impose a civil penalty in an amount not to exceed \$500 per violation or suspend, revoke, place on probation, or deny reissuance of any license or the certification of a real estate school course provider or instructor if at any time the licensee or certificate holder, whether acting as an agent or on his own account, is found guilty of:

- (1) making any substantial misrepresentation;
- (2) making any false promises of a character likely to influence, persuade, or induce;
- (3) pursuing a continued and flagrant course of misrepresentation, or of making false promises through agents, sales agents, advertising, or otherwise;
- (4) acting for more than one party in a transaction without the informed consent of all parties;
- (5) acting as an associate broker or sales agent while not licensed with a licensed principal broker, representing or attempting to represent a broker other than the principal broker with whom he is affiliated, or representing as sales agent or having a contractual relationship similar to that of sales agent with other than a licensed principal broker;
- (6) failing, within a reasonable time, to account for or to remit any monies coming into his possession which belong to others, or commingling those funds with his own, or diverting those funds from the purpose for which they were received;
- (7) paying or offering to pay valuable consideration, as defined by the commission, to any person not licensed under this chapter, except that valuable consideration may be shared with a licensed principal broker of another jurisdiction or as provided under the Professional Corporation Act;
- (8) being unworthy or incompetent to act as a principal broker, associate broker, or sales agent in such manner as to safeguard the interests of the public;
- (9) failing to voluntarily furnish copies of all

documents to all parties executing the documents;

(10) failing to keep and make available for inspection by the division a record of each transaction, including the names of buyers and sellers, the identification of the property, the sale price, any monies received in trust, any agreements or instructions from buyers or sellers, and any other information required by rule;

(11) failing to disclose, in writing, in the purchase or sale of property, whether the purchase or sale is made for himself or for an undisclosed principal;

(12) conviction of a criminal offense involving moral turpitude;

(13) advertising the availability of real estate or the services of a licensee in a false, misleading, or deceptive manner;

(14) in the case of a principal broker or a licensee who is a branch manager, failing to exercise reasonable supervision over the activities of his licensees and any unlicensed staff;

(15) violating or disregarding this chapter, an order of the commission, or the rules adopted by the commission and the division;

(16) breaching a fiduciary duty owed by a licensee to his principal in a real estate transaction;

(17) any other conduct which constitutes dishonest dealing; or

(18) unprofessional conduct as defined by statute or rule. 1991

61-2-12. Disciplinary action — Judicial review

- (1) (a) (i) Before imposing a civil penalty, revoking, suspending, placing on probation, or reissuance of any license or certificate, the division shall give notice to the licensee or certificate holder and schedule an adjudicative proceeding.
 - (ii) If the licensee is an active sales agent or active associate broker, the division shall inform the principal broker with whom the licensee is affiliated of the charge and of the time and place of the hearing.
 - (iii) If after the hearing the commission determines that any licensee or certificate holder is guilty of a violation of this chapter, the license or certificate may be suspended, revoked, denied reissuance, or a civil penalty may be imposed by written order of the commission in concurrence with the director.
- (b) If the hearing is delegated by the commission to an administrative law judge, and a ruling has been issued by the commission and the director, the licensee or certificate holder may request reconsideration by the commission by filing a written request stating specific grounds upon which relief is requested.
- (2) (a) Any applicant, certificate holder, licensee, or person aggrieved, including the complainant, may obtain judicial review or agency review by the executive director of any adverse ruling, order, or decision of the director and the commission.
 - (b) If the applicant, certificate holder, or licensee prevails in the appeal and the court finds that the state action was undertaken without substantial justification, the court may award reasonable litigation expenses to the applicant, certificate holder, or licensee as provided under

Addendum "C"

- (b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.
- (2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:
- (i) the name and mailing address of the party seeking judicial review;
 - (ii) the name and mailing address of the respondent agency;
 - (iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action;
 - (iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;
 - (v) a copy of the written agency order from the informal proceeding;
 - (vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;
 - (vii) a request for relief, specifying the type and extent of relief requested;
 - (viii) a statement of the reasons why the petitioner is entitled to relief.
- (b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.
- (3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.
- (b) The Utah Rules of Evidence apply in judicial proceedings under this section. 1990

63-46b-16. Judicial review — Formal adjudicative proceedings.

- (1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.
- (2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.
- (b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.
- (3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:
- (a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;
 - (b) the appellate court may tax the cost of preparing transcripts and copies for the record:
 - (i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or
 - (ii) according to any other provision of law.
- (4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by an agency action.

- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
- (b) the agency has acted beyond the jurisdiction conferred by any statute;
- (c) the agency has not decided all of the issues requiring resolution;
- (d) the agency has erroneously interpreted or applied the law;
- (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
- (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
- (h) the agency action is:
 - (i) an abuse of the discretion delegated to the agency by statute;
 - (ii) contrary to a rule of the agency;
 - (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
 - (iv) otherwise arbitrary or capricious 1988

63-46b-17. Judicial review — Type of relief.

- (1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.
- (b) In granting relief, the court may:
- (i) order agency action required by law;
 - (ii) order the agency to exercise its discretion as required by law;
 - (iii) set aside or modify agency action
 - (iv) enjoin or stay the effective date of agency action; or
 - (v) remand the matter to the agency for further proceedings.
- (2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute. 1987

63-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.

- (1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.
- (2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention.
- (3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.
- (4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may not grant